34063

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 504.

JOHN D. WALL AND THOMAS W. HUSKE, TRADING AS WALL & HUSKE, APPELLANTS,

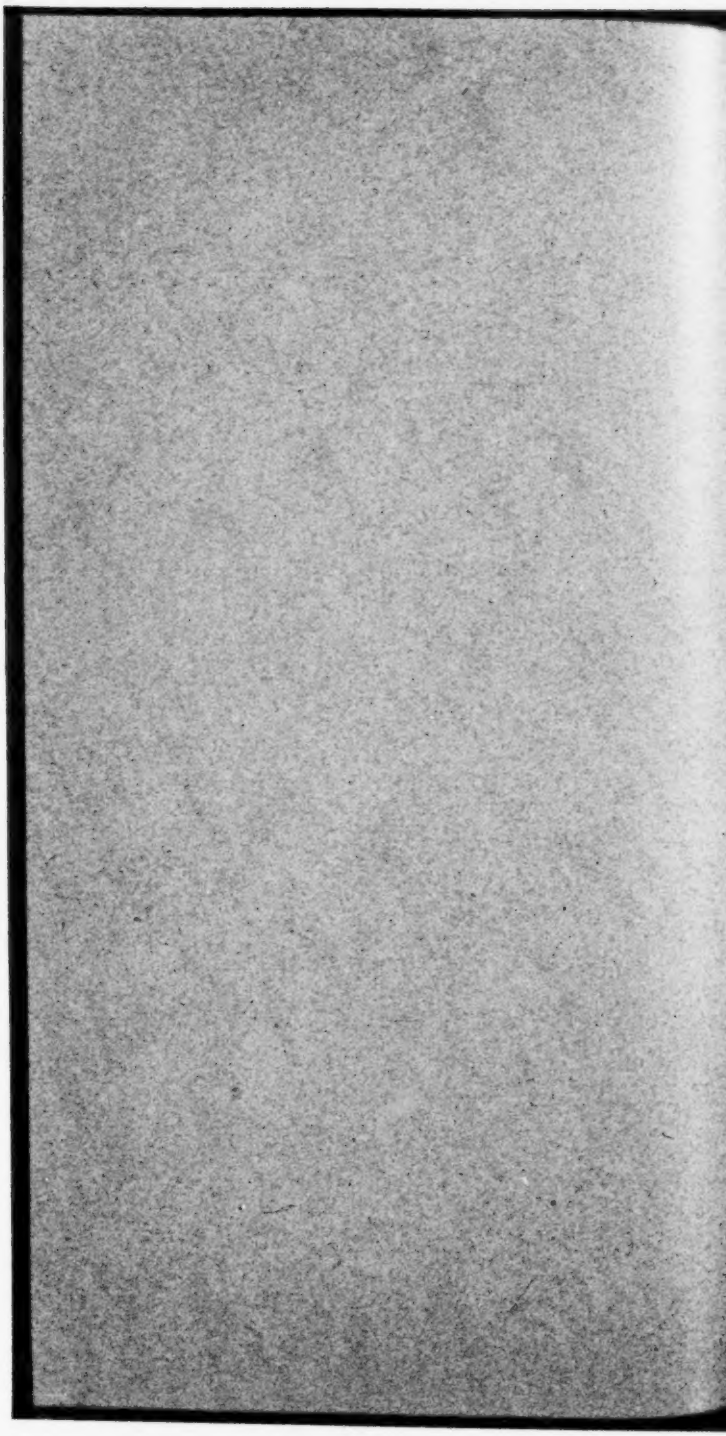
vs.

WALTER O. COX, TRUSTEE OF W. H. GILBERT, TRADING AS WINSTON HARDWARE COMPANY AND AS GILBERT HARDWARE COMPANY

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED DECEMBER 10, 1900.

(17,989.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1900.

JOHN D. WALL and THOMAS W. HUSKE, Partners, Trading as Wall & Huske, Petitioners,
versus
W. O. COX, Trustee of W. H. Gilbert, Trading as Winston Hardware Co. and as Gilbert Hardware Company, Respondents.

On certificate from the United States circuit court of appeals for the fourth circuit, at Richmond.

Glenn & Manly, Winston, N. C., for petitioners.
Jones & Patterson and L. M. Swink, of Winston, N. C., for respondents.

1 United States Circuit Court of Appeals, Fourth Circuit.

J. D. WALL and T. W. HUSKE, Partners, Trading as Wall & Huske, Appellant-,
vs.
W. O. COX, Trustee of the Estate of W. H. Gilbert, Trading as Winston Hardware Company and as Gilbert Hardware Company, a Bankrupt, Appellee. } No. 355.

An appeal from the district court of the United States for the western district of North Carolina, sitting at Greensboro, N. C.

This is to certify that certain creditors of W. H. Gilbert, on the 12th day of October, 1899, filed a petition in bankruptcy in the district court of the United States for the western district of North Carolina against said W. H. Gilbert, trading as the Winston Hardware Company and Gilbert Hardware Company, alleging as grounds on which said W. H. Gilbert should be declared a bankrupt the following:

"That said W. H. Gilbert is insolvent, and that within four months next preceding the date of this petition the said W. H. Gilbert committed an act of bankruptcy, to wit, on the tenth day of October, 1899, in that he conveyed, transferred, concealed, or removed or permitted to be concealed or removed a large portion or all his property with intent to hinder, delay, and defraud his creditors by certain bills of sale which he made to J. D. Wall and T. W.
2 Huske, of Winston, N. C., and also in that he transferred while insolvent a portion of his property to one or more of his creditors with intent to prefer such creditors over others of his creditors.

That on the 14th day of October, 1899, on the petition of the aforesaid creditors of W. H. Gilbert, a notice to show *cause* and restraining order *was* issued by his honor H. G. Ewart, judge.

United States District Court, Western District *Court* of North Carolina.

In the Matter of W. H. GILBERT, Trading as the Winston Hardware Company and as the Gilbert Hardware Company, In Bankruptcy.

To J. D. Wall and T. W. Huske, trading as Wall & Huske, of Winston, N. C.:

Pursuant to an order made by Hon. Hamilton G. Ewart, judge of the district court of the United States for the western district of North Carolina, on the 14th day of October, A. D. 1899, at Hendersonville, N. C., you are hereby notified and commanded to appear before said court, at Gatesville, N. C., on the 24th day of October, A. D. 1899, and show cause, if any there be, why you shall not be perpetually enjoined from selling, transferring, or disposing of the stock of goods and other property alleged to have been purchased by you from the said W. H. Gilbert, bankrupt; and in the meantime you are hereby restrained and enjoined from disposing of the said stock of goods or any part thereof, or any proceeds there-
3 from, or any books, accounts, invoices, or other evidence of the amount and value of the same.

Witness the Honorable Hamilton G. Ewart, judge of the said court, and the seal thereof, at Greensboro, in said district, on the 14th day of October, A. D. 1899.

[SEAL.] SAM'L L. TROGDEN, *Clerk.*

At the time of the issuing of said order Wall & Huske, appellants, had in their possession a stock of goods purchased by them from W. H. Gilbert on the 10th day of Oct., 1899. On the 27th day of October, 1899, Judge Ewart made an order adjudging said W. H. Gilbert a bankrupt, and on the 6th day of November, 1899, made the following order:

"United States District Court, Western District of North Carolina.

In re W. H. GILBERT, Trading as the Winston Hardware Company and as the Gilbert Hardware Company, and WALL & HUSKE.

In the above-entitled cause it is ordered that the restraining order heretofore issued be continued until the appointment and qualification of trustee of W. H. Gilbert, bankrupt. Upon the appointment and qualification of said trustee in a proper case and upon the proper showing an injunction or restraining order may be obtained upon application, in which Wall & Huske, defendants above named, may be made parties, restraining the sale or other disposition of any of the property until a hearing may be had and
4 the matters at issue be determined, either by a suit in equity or action at law in the United States courts or the courts of the State, as petitioners may be advised."

At Hendersonville, N. C., this the 6th day of November 1899.

H. G. EWART,
U. S. Judge.

That on the 23rd day of November, 1899, W. O. Cox was, by the creditors of W. H. Gilbert, duly elected as trustee of said W. H. Gilbert, bankrupt, and qualified as such, and on the 6th day of December, 1899, said W. O. Cox, trustee, sued out a writ of subpœna in the district court of the United States for the western district of North Carolina, sitting as a court of bankruptcy, which subpœna was duly served on the defendants Wall & Huske, and in a cause entitled W. O. Cox, trustee of the estate of W. H. Gilbert, trading as the Winston Hardware Company and as the Gilbert Hardware Company, a bankrupt, complainant, against J. D. Wall and T. W. Huske, partnesr, trading as Wall & Huske, respondents, the said W. O. Cox, trustee, as aforesaid, did, on the 6th day of December, 1899, duly file his bill of complaint as follows:

5 *Caption.*

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

In the District Court. In Bankruptcy.

At a district court of the United States for the western district of North Carolina, at chambers, in Winston, on the 6th day of January, in the year of our Lord one thousand and nine hundred, within said district, before the Honorable Hamilton G. Ewart, United States district judge, holding said court, the following proceedings were had:

Bill of Complaint.

In the District Court of the United States for the Western District of North Carolina. In Bankruptcy.

WALTER O. COX, Trustee of the Estate of W. H. Gilbert, Trading as Winston Hardware Co. and as Gilbert Hardware Co., a Bankrupt, Complainant,
vs.
J. D. WALL and T. W. HUSKE, Partners, Trading as Wall & Huske, Respondents. } In Equity. No. —.

To the honorable the judges of the district court of the United States for the western district of North Carolina, as a court of bankruptcy:

Walter O. Cox, trustee of the estate of W. H. Gilbert, trading as Winston Hardware Co. and as Gilbert Hardware Co., a bankrupt, of Winston, and a citizen of the State of North Carolina, brings this his bill against J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, of Winston, citizens of the State of North Carolina, and inhabitants of the western district of North Carolina.

And thereupon your orator complains and says that W. H.
6 Gilbert, trading as Winston Hardware Co. and as Gilbert Hardware Co., late a resident of Winston, North Carolina, in the said western district of North Carolina, was there-fore, to wit, on

the 27th day of October, A. D. 1899, duly adjudicated a bankrupt by this honorable court, sitting as a court of bankruptcy, within the intent and meaning of the acts of Congress relating to bankruptcy.

Your orator further shows to your honor that thereafter, on the 23rd day of Nov., A. D. 1899, your orator was duly appointed trustee of the estate of said bankrupt and qualified as such trustee on the 2nd day of December, A. D. 1899, by giving bond, as required by the order of this honorable court and the acts of Congress relating to bankruptcy, and entered upon the performance of his duties as such trustee.

Your orator further shows to your honor that on the 9th day of October, A. D. 1899, and for about twelve months theretofore, W. H. Gilbert, bankrupt as aforesaid, was conducting a retail hardware store on Trade street, Winston, N. C., and was the owner of and in possession of a large and valuable stock of hardware, store fixtures, and bills receivable, situated therein and owing thereto. The actual value of said stock of hardware, store fixtures, and accounts due amounted to between $17,000 and $18,000.

Your orator further shows to your honor that at the date aforesaid, to wit, on the 9th day of October, A. D. 1899, the said W. H. Gilbert was insolvent, owing large amounts of money, contracted in the purchase of the stock of hardware heretofore mentioned. A large amount of said indebtedness had heretofore been extended as to the time of payment upon the false and fraudulent representation of the said W. H. Gilbert, a large portion of said indebtedness being
7 past due and a large portion becoming due within a few weeks, this indebtedness being evidenced to a large extent by notes, a portion falling due in Octo., 1899, another portion falling due in Nov. and Dec., 1899, and Jan'y 1st, 1900.

Your orator further shows to your honor that thereafter, to wit, on the night of Octo. 10th, 1899, and subsequent to the passage of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1st, 1898, and within four months prior to the filing of the petition of certain creditors to have the said W. H. Gilbert adjudicated a bankrupt, the said W. H. Gilbert, with intent on his part to hinder, delay, or defraud his creditors, conveyed, transferred, and assigned all of his property, consisting of this stock of hardware, store fixtures, and accounts situated in his said storehouse, on Trade street, Winston, N. C., by means of a certain paper-writing purporting to be a deed or bill of sale to the respondents, J. D. Wall and T. W. Huske, trading as Wall & Huske.

Your orator further shows to your honors that within a few minutes after the execution of the said paper-writing, purporting to be a deed or bill of sale, and the transfer, conveyance, and assignment was made by the said W. H. Gilbert, the said Gilbert, having demanded and received currency in payment of said stock of goods and having received whatever payments were made or pretended to be made to him, pocketed the money so received and left for parts unknown without applying any money so received or to be received to the payment of his indebtedness, and immediately thereafter the

respondents went into the possession of the entire property, as aforesaid, belonging to the bankrupt in the city of Winston, N. C.

Your orator further shows to your honors that the petition
8 in bankruptcy alleging these facts was filed in this honorable court against the said W. H. Gilbert on the 12th day of Octo., A. D. 1899, and the conveyance, transfer, and assignment of this property and the execution of the aforesaid paper-writing purporting to be a deed or bill of sale for said property was within four months prior to the filing of said petition and the adjudication made thereon, and that at the date of the said conveyance, transfer, and assignment of the said property and the execution of the paper-writing the said W. H. Gilbert was insolvent, and the said conveyance, transfer, and assignment of said stock of goods, fixtures, and accounts is fraudulent and void and the said paper-writing is inoperative and void, in that same is a fraud upon the bankrupt act or the act entitled an "Act to establish a uniform system of bankruptcy throughout the United States," sec. 67 (*e*).

(4.) Your orators further shows to your honors that the said transfer, conveyance, and assignment to said J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, was made and done by said Gilbert and by said Wall & Huske, respondents, as aforesaid, with intent to hinder, delay, and defraud the creditors of *the* Gilbert, and the execution of the paper-writing purporting to be a deed or bill of sale was a part of the scheme to hinder, delay, and defraud the creditors of the said W. H. Gilbert.

Your orator further shows to your honors that he has requested the respondents, J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, to deliver up the said property to him as such trustee in order that the same might be divided among the creditors of the said W. H. Gilbert, and surrender up and cancel the paper-writing purporting to be a deed or bill of sale for same, and your orator hoped that the said J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, respondents, would have complied
9 with the reasonable requests of your orator, as in justice and equity they ought to have done; but now so it is, etc., that the respondents allege and pretend that the said transfer, conveyance, and assignment is valid, and that the paper-writing purporting to be a deed or bill of sale to the said stock of hardware, store fixtures, and accounts is a valid deed or bill of sale to the same, and that by reason of said conveyance, transfer, and assignment and the execution of the paper-writing, as aforesaid, they acquired title to said property therein described, and that they were purchasers in good faith and for a present fair consideration; and whereas—

Your orator charges the contrary to be the truth, in that the respondents knew or had been informed or had reason to know, believe, or could have ascertained by exercising reasonable prudence and diligence, that the said W. H. Gilbert was insolvent, and that this conveyance, transfer, and assignment was void, in that the same was in fraud of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," the same was being made on the part of the said W. H. Gilbert with in-

tent to defraud his creditors, to abscond with the money that should be paid to him, and appropriate same to his own use; and they, the said respondents, participated in said fraudulent conduct and intent to defraud the creditors of the said W. H. Gilbert, and but for their aid the fraud could not have been committed, and as the evidence thereof your orator expressly charges that about 18 months prior to this time the said W. H. Gilbert came to Winston, N. C., a man of no property whatever, and accepted a position as a clerk in the hardware store of Brown, Rogers & Co.; that a few weeks thereafter he began business in a small way with one R. B. Crawford, in Winston, N. C., on Trade street, and that about the 25th day of August, 1898, he
10 bought out R. B. Crawford's one-half interest in the firm for $1,200, and immediately thereafter swelled his stock to immense proportions, and that it was well known amongst the hardware trade and business men of Winston that the said Gilbert was doing a wild and reckless business, selling hardware at and below cost, always for cash; that shortly prior to this time the said Gilbert had been compelled to obtain an extension from his various creditors to the amount of $10,500.00, and that these facts were well known to the respondents and the counsel they consulted during the negotiations pending the purchase and conveyance of this stock from the said Gilbert.

Your orator further expressly charges, as evidence of the knowledge of the fraudulent character of this sale on the part of the said respondents, that this large stock of goods, amounting in value to some $17,000 to $18,000, was not inventoried by respondents or anyone else for them, and whatever examination was made of the stock was made at night-time and done secretly. Your orator further alleges, as evidence of the fraudulent intent on the part of the respondents, that they examined the books of said Gilbert or could have done so, and that the books were offered to them for examination if they did not actually examine them, and your orator expressly charges that the same books would have shown that the stock had not been paid for or no considerable part thereof, and in the same book appeared the names and addresses of the creditors of the said Gilbert, with the amounts due each one of them, and the books would have further shown that he was ordering large and unusual quantities of goods from all over the United States; that these large and unusual quantities of goods were passing the front door of the
11 said Wall & Huske on their way from the depot to Gilbert's place of business; that they could have ascertained from the books that the said Gilbert did not intend to pay for the goods and could not have done so with the amount of — paid to him by respondents.

Your orator further charges, as an evidence of the knowledge of respondents of Gilbert's fraudulent intent, that the said Gilbert had attempted to sell out his entire stock of hardware, store fixtures, and accounts, both in his store in Winston, N. C., and in Martinsville, Va., to the following-named persons, to wit, R. C. Click, A. F. Messick, Norman & Moyr, and others for the sum of $5,000 and less,

stating to those prospective purchasers his intention was not to pay his creditors, but to pocket the money and leave on the next train after receiving same, and your orator expressly charges that these facts were well known to the respondents or the counsel with whom they counselled during the pendency of these negotiations.

Your orator further charges, as an evidence of respondents' knowledge of W. H. Gilbert's fraudulent intent and insolvency, that this conveyance, transfer, and assignment was of all of the bankrupt's tangible property; that the said W. H. Gilbert was engaged in the retail hardware business in the city of Winston; that respondents knew that fact and, furthermore, knew that this sale was out of the usual course of business of the said Gilbert and was *prima facie* fraudulent; that same was a disposition of all of the bankrupt's property subject to execution; that respondents knew that said Gilbert owned no real estate, was doing business in a rented store, and was living in a rented house, and your orator charges that respondents were put upon notice of said Gilbert's fraudulent intent.

Your orator further charges, as an evidence of respondents'
12 knowledge of Gilbert's fraudulent intent and as evidence of their participation therein, that shortly prior to this time the said respondent, J. D. Wall, had told Frank Guildener, C. F. Cuthrell, and others that said Gilbert was insolvent and would fail.

Your orator further charges that on the 11th day of Octo., A. D. 1899, the representative of R. G. Dunn & Co., W. J. Roberts, the agent for a large number of creditors of the said W. H. Gilbert, after being informed that this pretended and proposed sale was being considered by respondents, went to T. W. Huske, one of the respondents, demanding of him to know the particulars of same and stated that he had parties interested and desired to notify them in order that they might be in a position to protect themselves, and that said parties were large creditors of Gilbert; that the said Huske, respondent, as aforesaid, refused to give him any information, although specially requested so to do; that thereafter, when the pretended transfer and conveyance had been consummated and the paper-writing purporting to be a deed or bill of sale, had been executed, — sent for the said W. J. Roberts, and as he was approaching him the said Huske shook *and* bill of sale at the representatives of creditors and told him that they had bought; that immediately thereafter they went into possession of the stock of goods and property described, as aforesaid, and within a few minutes thereafter the said Gilbert had boarded the train and left for parts unknown, and was out of the reach of his creditors.

Your orator further charges, as knowledge of the fraudulent intent of the respondents, that they knew or believed, or could have ascertained by exercising reasonable and ordinary prudence, that the Wachovia national bank intended to obtain an unlawful preference by means of this conveyance, transfer, and assignment and the exe-
13 cution of the aforesaid paper-writing purporting to be a deed or bill of sale for this property; that it was well known to the said respondents that the said bank would obtain the payment of their debt in full, and that the amount of money they

alleged to have paid to the said Gilbert, bankrupt, was not sufficient to discharge the remainder of his indebtedness in full or pay 50 % thereof.

Your orator further charges that respondents did not pay a present fair consideration for the stock of hardware, store fixtures, and accounts belonging to and due the said Gilbert, bankrupt, mentioned and described in the paper-writing purporting to be a deed or bill of sale. You- orator expressly charges that at the date of execution of the paper-writing and at the date of the alleged transfer and conveyance and assignment that the actual value of said stock of goods, store fixtures, and accounts was from $17,000 to $18,000, and the said paper-writing purporting to be a deed or bill of sale therefor purports only a consideration of only $8,000, which amount, if actually paid, would be less than 50 % of the real value of the stock of hardware, store fixtures, and accounts alleged to have been conveyed.

Your orator further expressly charges that the sum of $8,000 was not absolutely and unconditionally paid to the said W. H. Gilbert by respondents for the said stock of hardware, store fixtures, and accounts due him, as appears by the said paper-writing purporting to be a deed or bill of sale.

Your orator further charges that the said respondents are threatening to intermingle and move and have already intermingled a portion of this stock of hardware with their own stock of hardware;
that they are threatening to sell and dispose of and have
14 disposed of a portion of the said stock; that they have collected and are threatening to collect the accounts due and owing the said bankrupt, W. H. Gilbert.

Your orator further charges that the respondents have or formerly had documents in their possession, viz., the books, accounts, invoices, files of letters and statements, and inventories belonging to the said W. H. Gilbert, which, if procured, would show the truth of your orator's case, and that they ought to give a schedule of them and produce them for inspection and proof; that respondents failed and neglected to make any enquiries as to Gilbert's financial condition or as to his purpose of his fraudulent transfer, and actually shut their eyes to the facts and circumstances showing or tending to show that he owed large sums of money, was insolvent, and intended the fraud that was actually committed.

Your orator further charges that no itemized or accurate inventory of the said stock of hardware has ever been taken, and your orator will suffer irreparable loss and damage by allowing and permitting the said respondents to continue to dispose of or sell the stock of hardware, to intermingle same with their own stock of hardware, or to collect the accounts due and owing the said bankrupt, W. H. Gilbert; that it will be impossible to distinguish this stock of hardware from the other stock of hardware belonging to Wall & Huske, since no inventory has been taken, it will be impossible to estimate accurately the amount of said stock after being so disposed of or intermingled with their other stock.

Your orator further charges that your respondents are men of

small means as compared with the value of the stock of hardware claimed and cannot respond in damages to your orator for
15 the value of the said stock of goods if sold or intermingled, and your orator charges that the said J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, ought to be restrained by injunction from selling, disposing of, or intermingling or otherwise interfering with the said stock of hardware or the accounts due and owing to the said W. H. Gilbert, bankrupt, and that some proper person ought to be appointed by this court to collect in said accounts and dispose of the said stock of goods; and your orator further charges that an account ought to be taken between the complainant and the respondents to ascertain the amount of said stock of goods so disposed of, intermingled, and sold heretofore, and also the amounts collected by the respondents from the accounts.

All of which actings, doings, and pretenses of the said respondents are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your orator.

In consideration whereof and forasmuch as your orator is remediless in the premises at and by the strict rules of common law and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable; to the end, therefore, that said respondents may, if they can, show cause why your orator should not have the relief hereby prayed, and may upon their separate and respective corporal oaths and according to the best and utmost of their respective knowledge, information, and belief full, true, direct, and perfect answers make to such of the several interrogatories hereinafter numbered and set forth as by note hereunder written they are respect*fu*lly required to answer—that is to say:

(Here follows ninety-three interrogatories—omitted.)

16 And that the alleged sale heretofore set out be decreed by this honorable court to be fraudulent and void under and by virtue of the acts of Congress relating to bankruptcy, entitled "An act to establish a uniform system of bankruptcy throughout the United States," sec. 67 (*e*) thereof, and that the said sale, as alleged, *to* be set aside as fraudulent and void, as made with intent to hinder, delay, and defraud the creditors of the said W. H. Gilbert as to this complainant, and that said property be decreed to belong to and pass to this complainant as a part of the estate of the said W. H. Gilbert, bankrupt; that the paper-writing bearing date of Oct. 11th, 1899, executed by the said W. H. Gilbert to the respondents, J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, be declared null and void, and that the same be surrendered up and cancelled by order of this honorable court, and that in the meantime that the said J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, respondents, and each of them, their agents, employees, and attorneys, be restrained and enjoined from selling, disposing of, or intermingling, or in any manner from interfering with said stock of goods described heretofore and mentioned in the same paper-writing purporting to be a deed or bill of sale until the further order and decree of this court in the premises.

And that some proper person be appointed to receive and collect

all moneys and dispose of the stock of goods which may be coming from the said stock of hardware and store fixtures and accounts, as aforesaid.

That an accounting be had as to the said stock already disposed of and intermingled, and that your orator may have such fur-
17 ther relief in the premises as the nature of the circumstances of the case may require and to your honors may seem meet.

And may it please your honors to grant unto the complainant a writ of injunction, &c.

May it please your honors to grant unto the complainant a writ of subpœna, to be addressed to the said J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, thereby commanding them and each of them, at a certain time and under a certain penalty therein limited, personally to appear before this honorable court, and then and there full, direct, and perfect answers make to all and singular the premises, and further to stand to, perform, and abide such further decrees, directions, and orders therein as to this honorable court shall seem agreeable to equity and good conscience.

WALTER O. COX, *Trustee.*

A. H. ELLER,
JONES & PATTERSON,
LOUIS M. SWINK,
Att'ys for Complainant.

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

On this the 5th day of December, 1899, before me personally appeared Walter O. Cox, trustee, the above-named complainant, who made solemn oath that he had read the foregoing bill of complaint subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

SAM'L L. TROGDON, *Clerk.*

(Here follows numbers of interrogatories required to be answered by J. D. Wall and T. W. Huske respectively—omitted.)

Endorsed: Filed in this office Dec. 15, 1899, 7.30 p. m. Sam'l L. Trogdon, clerk.

18 *Supplemental Bill of Complaint.*

In the District Court of the United States for the Western District of North Carolina. In Bankruptcy.

WALTER O. COX, Trustee of W. H. Gilbert, Trading as Winston Hardware Co. and as Gilbert Hardware Co., a Bankrupt, Complainant,

vs.

J. D. WALL & T. W. HUSKE, Partners, Trading as Wall & Huske, Respondents.

To the honorable the judge of the district court of the United States for the Western District of North Carolina:

Your orator, Walter O. Cox, trustee of the estate of W. H. Gilbert, trading as Winston Hardware Co. and as Gilbert Hardware Co., a bankrupt, and a citizen and resident of said State of North Carolina and district aforesaid, shows unto your honor that he has already filed in the district court of the United States for the western district of North Carolina, sitting as a court of bankruptcy, the court having jurisdiction of J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, being citizens of said State and inhabitants of said district, a bill of complaint against the said J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, seeking to set aside a certain sale of a stock of hardware made by the bankrupt, W. H. Gilbert, to the said J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, and also for the purpose of cancelling of a certain paper-writing purporting to be a bill of sale or deed, executed by the said bankrupt to the said respondents, under date of Octo. 11th, A. D. 1899, and also for other relief, as appears more fully

19 by an inspection of the original bill of complaint filed in the said cause: that the property so transferred or sold, to wit, the stock of hardware, store fixtures, and accounts, is within this district and in the jurisdiction of this court.

Your orator respectfully refers to said bill of complaint for a more particular statement of the contents thereof, and you- orator files herewith a true copy of said bill of complaint and pray- that your honor will take the same as a part of this ancillary bill. Your orator further shows that all the statements contained in said bill are true, as he is informed and verily believes, and he repeats the same herein.

And your orator shows to your honor that the process in said bill was been duly issued and served upon the respondents therein named, J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, by the marshal of this honorable court.

And your orator further shows that the property in question is a large and valuable stock of hardware, store fixtures, and accounts, and that said property, as aforesaid, is deteriorating in value and damaging by reason of being stored in the building known as the Vaughn building, in the city of Winston, N. C., and your orator

further shows to your honor that the cost of storage of the said property amounts to about $50.00 per month, besides the other necessary expenses, such as insurance, &c.

And your orator further shows that no inventory has ever been taken of said property, and there is no way known unto your orator to come to a fair and equitable valuation of said property, and your orator further shows that the respondents are threatening to dispose of, sell, and intermingle, if permitted to do so, without taking or permitting to be taken any inventory of said property; that the respondents are men of small means, having bought or pre-
20 tended to buy said stock of goods, fixtures, and accounts wholly on credit, and cannot respond to your orator in damages even if the true inventory and value of the said stock was known, by which means your orator will suffer irreparable loss and damages if the said stock is permitted to be sold, intermingled, or otherwise disposed of by the said respondents.

For these reasons and for the other and further good and sufficient reasons, as appears by the copy of the original bill of complaint hereto attached, your orator prays this honorable court to issue a notice to said respondents to show cause, if any they have, why a receiver should not be appointed by this honorable court to dispose of and sell the said stock of goods and hold the funds so derived from such sale until the determination of this litigation; that the accounts, store fixtures, etc., all be reduced to money under the orders of this honorable court, and that the funds be held until the termination of this litigation.

Your orator further prays that an injunction issue from this honorable court, commanding and restraining the respondents from selling, disposing of, or intermin-ling, or in any manner interfering with the said property until the further orders of this honorable court.

WALTER O. COX, *Trustee.*

A. H. ELLER,
LOUIS M. SWINK,
JONES & PATTERSON,
Att'ys for Complainant.

Walter O. Cox, being duly sworn, deposes and says that he has read the foregoing, and that the same is true of his own knowledge, except as to such matters as are therein stated on information and belief, and as to such matters he believes it to be true.

Witness my hand and official seal this the 12th day of Dec., 1899.

[SEAL.] FRANK F. JONES,
Notary Public.

21 Endorsed: Filed in this office Dec. 16, 1899. Sam'l L. Trogdon, clerk.

Exhibit to the supplemental bill of complaint is a copy of the original bill of complaint, and under direction of respondents' counsel it is not copied again.

January 27th, 1900.

SAM'L L. TROGDON, *Clerk.*

22 The defendants, Wall & Huske, at the time of filing the subpœna and bill of complaint and supplemental bill of complaint were in possession of the said stock of goods, holding same under a bill of sale from W. H. Gilbert.

That on the supplemental bill of complaint filed his honor Judge Ewart issued an order to defendants, Wall & Huske, on the 15th day of December, 1899, to appear before him, at Charlotte, N. C., on the 18th day of December, 1899, and show cause, if any, why a receiver should not be appointed by the court to take in charge the stock of goods described in the bill of complaint, and an injunction was issued by his honor restraining defendants from disposing of the stock until the further order of the court, etc.

By consent, said hearing was postponed, to be heard at Winston, on the 9th day of January, 1900.

At expiration of the injunction, as per order of Judge Ewart of November 6th, 1899, counsel of Wall & Huske agreed that stock of goods should not be removed until Cox, trustee, should qualify and bring suit, as if injunction in force.

The defendants, Wall & Huske, filed on the 6th day of January, 1900, the following plea and demurrer:

In the District Court of the United States for the Western District of North Carolina. In Bankruptcy.

WALTER O. COX, Trustee of W. H. Gilbert, Trading as Winston Hardware Company and as Gilbert Hardware Company, a Bankrupt, Complainant,

vs.

J. D. WALL and THOS. W. HUSKE, Trading as Wall & Huske, Defendants.

To the Honorable Hamilton G. Ewart, judge of the district court of the United States for the western district of North Carolina:

23 The defendants in the above-entitled cause, answering the affidavits filed in the cause by complainant on the 12th day of December, 1899, upon which defendants moved for a receiver to be appointed of the stock of goods now in the possession of the defendants and purchased by them from W. H. Gilbert, say:

I.

That they admit the complainant filed in the district court of the United States for the western district of North Carolina a bill of complaint against defendants seeking to set aside a certain sale of the stock of hardware made by W. H. Gilbert to the defendant; all of which will appear by the said bill of complaint and an inspection thereof.

The defendants admit that the stock of hardware, store fixtures, and accounts *is* within this district, to wit, *is* situated in the city of Winston, in a storehouse and warehouse therein.

Defendants further admit that a subpœna has been duly served upon these defendants, issued by the district court of the United States aforesaid at the time of filing said bill of complaint.

Defendants further admit that the stock of hardware, store fixtures, and accounts *is* of value as appears in an answer of these defendants, to which reference is made and which will be duly filed in this cause should the court demand a filing of said answer after hearing the motions and demurrers and pleas of these defendants as will be presented.

Defendants admit that said property is deteriorating in value and damaging by reason of being locked up in a storehouse and warehouse under the restraining order of the court obtained at the
24 instance of the creditors of the bankrupt, W. H. Gilbert, the creditors aforesaid being the same as obtained the appointment of the complainant as trustee of W. H. Gilbert, bankrupt, and who obtained the issuing of the subpœna and obtained the filing of the bill of complaint in the said action.

(25.) Defendants deny that no inventory ever was taken of said property, and that there is no way to come to a fair and equitable value thereof.

Defendants say that they are not now threatening to dispose of or sell said property by reason of the injunction of this court; that they have not in any way intermingled the goods purchased by them from W. H. Gilbert with their own stock of hardware, and that the only removal of goods which has been made from one store to the other appears fully in Exhibits 1 & 2 and 3, hereto attached.

Defendants admit that they are men of no very large means, but aver that they are responsible and able to pay any damages and amounts which may be adjudged against them by this court or any other court by reason of their disposition of said goods.

Defendants deny that they have pretended to buy the said property from said W. H. Gilbert, but allege and aver that they have actually purchased and paid for same, as appears by their answer, to which reference is made aforesaid.

Defendants deny that the complainant will suffer any irreparable loss or damage if the stock is permitted to remain in the possession of defendants or be disposed of by them.

And in support of this plea of defendants they respectfully refer to their answer as an aid of this their plea.

25

II.

Defendants, specially appearing under protest of the purpose of this plea, and for no other, say:

That the complainant, as trustee, if he has any right to the stock of goods described, has a plain, clear, and adequate remedy at law to recover same from these defendants, and is not entitled to evoke the aid of the equitable jurisdiction of this court to enforce the right, and that this honorable court, sitting as a court of equity, has no jurisdiction to hear and determine the question as a court of equity.

Defendants further say that the district court of the United States for the western district of North Carolina has no jurisdiction to en-

tertain this bill of complaint, or to determine the question arising between the complainant, as trustee in bankruptcy of W. H. Gilbert, and these defendants.

That these defendants hold and claim title to the said property described in complainant's bill under a purchase from W. H. Gilbert prior to the institution of the proceedings in bankruptcy against W. H. Gilbert.

That both W. H. Gilbert, the complainant trustee, and these defendants were, at the time of filing said bill of complaint, and now are, citizens of the State of North Carolina, and that the defendants do not consent to the jurisdiction of this court.

Wherefore these defendants pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the bill of complaint herein, or to this motion for the appointment of a receiver, or for an injunction, or for any of the
26 matter- and things therein contained, and pray that the motion of complainant for (26) the appointment of a receiver and for this injunction be denied by this honorable court, and that they be hence dismissed with their reasonable cost in this behalf sustained.

And, further, defendants pray that the original bill of complaint filed herein be dismissed by this honorable court and that these defendants recover their reasonable cost in this behalf sustained.

JOHN D. WALL.
T. W. HUSKE.

GLENN & MANLY,
Attorneys for Defendants.

UNITED STATES OF AMERICA,)
Western District of North Carolina,) *ss:*

At Winston, in this district, on the — day of January, 1900, personally appeared before me John D. Wall and Thomas W. Huske, defendants herein, who, being severally duly sworn, depose and say that they have read the foregoing plea by them subscribed and know the contents thereof, and that the facts set forth in the plea are true of their own knowledge, except such matters as are therein stated on information and belief, and as to those they believe them to be true, and that this plea is not interposed for delay.

JOHN D. WALL.
T. W. HUSKE.

Sworn to and subscribed before me this the 6th day of January, 1900.

[SEAL.] W. I. BROOKS,
Notary Public.

27 We hereby certify that in our opinion the foregoing plea to the jurisdiction of the court is well founded in point of law.

WATSON, BUXTON & WATSON,
GLENN & MANLY,
Of Counsel for Defendants.

The motion for receiver and injunction was heard before his honor H. G. Ewart, judge, at Winston, on the 9th day of January, 1900, on the bill of complaint, supplemental bill of complaint of Cox, trustee, and the plea and demurrer of Wall & Huske; affidavits of both sides in support of and against motion for receiver. Argument of counsel was made on both sides. On the 15th day of January, 1900, his honor rendered judgment overruling the demurrer of Wall & Huske and appointing a receiver, as appears from the following order:

28

Order.

"In the above-entitled cause the plea to the jurisdiction of the court filed by respondents is overruled. On the reading and consideration of the bill of the plaintiff and answer of respondents, it is ordered, adjudged, and decreed that the injunction issued by this court December 16th, 1899, be continued until the final hearing of this cause, and the respondents are hereby enjoined and restrained from interfering in any manner with the stock of goods described in the bill of the plaintiff, the same being the identical stock of goods alleged to have been purchased by respondents of W. H. Gilbert, bankrupt.

Samuel F. Vance, of the city of Winston, N. C., is hereby designated and appointed as temporary receiver to take into his possession the said stock of goods described in the bill of complaint."

On the 15th day of January, 1900, his honor filed an opinion in support of the order of the 13th instant, in which he says:

"This is a bill in equity, filed by the complainant as trustee of the bankrupt, for the purpose of settin- aside a sale made by the bankrupt, Gilbert, to the respondents of a certain stock of hardware, the said sale having been made, as complainant alleges, in fraud of the bankruptcy act and in fraud of the creditors of the said estate. The facts are as follows:

The respondents demurrer to the bill filed in this case, raising the question of the jurisdiction of the district court to entertain this cause. It is claimed that as the bankrupt, the trustee, and
29 the respondents are all citizens of this State and residents of this district that by section 23 B of the act cognizance of such a controversy can only be taken by the State courts."

A careful examination of the cases decided satisfies me that the section referred to, to wit, 23 *b*, providing that "suits by the trustee shall only be brought or prosecuted in the court where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted," is a limitation upon the jurisdiction of circuit courts of the United States and does not affect the jurisdiction in bankruptcy conferred upon the district courts by other clauses of the act, and that a court of bankruptcy has jurisdiction of a suit by a trustee to recover property alleged to have been conveyed or transferred in fraud of his creditors, notwithstanding that the trustee and the bankrupt and the defendants are all citizens of the State.

The defendants, Wall & Huske, desiring a review of the order overruling their demurrer, duly filed in the United States circuit court of appeals on the 22nd day of January, 1900, a petition asking the supervisory power of the court under the act of Congress of 1898, known as the bankrupt act.

That in the circuit court of appeals the complainant filed a demurrer, which speaks as follows:

The demurrer of the above-named plaintiff, Walter O. Cox, trustee of W. H. Gilbert, trading as Winston Hardware Company and as Gilbert Hardware Company, a bankrupt, to the petition of the above-named defendants.

30 1. That it appeareth by the petitioner's own showing in the said petition that the only question involved or at issue and heard and passed upon by Judge Ewart and the only ones asked to be revised by this court are:

(1.) As to the jurisdiction of the United States district court for the western district of North Carolina, sitting as a court of bankruptcy, to entertain a plenary suit between the complainant, W. O. Cox, trustee, and the defendants for the possession of the goods in controversy.

(2.) As to the jurisdiction of the said court to entertain a bill of equity for the relief sought by the complainant, W. O. Cox, trustee.

The cause was heard before the circuit court of appeals at February term, 1900, as on appeal, counsel for complainant and defendants agreeing that the record presented fully the question of review and should be heard on the merrits of the matters sought to be reviewed.

It is agreed that the cause was heard before his honor Judge Ewart on demurrer of defendants to the jurisdiction of the United States district court, and that the cause was heard before the United States circuit court of appeals on demurrer to the jurisdiction of the United States district court without objection from complainant as to form of plea, except complainant did make this objection on the argument made on the rehearing.

On the 1st day of May, 1900, the circuit court of appeals filed an opinion sustaining the jurisdiction of the United States district court for the western district of North Carolina and duly reported in Federal Reporter, vol. No. 101, page 403.

31 The defendants, Wall & Huske, on the 2nd day of June, 1900, filed a motion to rehear, to the end that the decree of the United States circuit court of appeals aforesaid, affirming the order of the district court aforesaid, might be reversed.

Motion to rehear was granted on the 9th day of July, 1900, and the cause having now come on for argument at the November term, 1900, of the said circuit court of appeals for the fourth circuit before the undersigned, and said court desiring, for its proper decision, the instruction of the Supreme Court of the United States concerning certain questions or propositions of law arising in said cause:

Now, therefore, we, the undersigned, do hereby certify said ques-

tions or propositions of law to the Supreme Court of the United States for instruction as aforesaid.

First. Under the facts and the pleadings above stated, had the district court of the United States for the western district of North Carolina jurisdiction over the controversy?

Second. Said district courts having adjudicated bankruptcy on account of an alleged fraudulent transfer of the bankrupt's property, and having appointed a receiver to hold the estate thus conveyed, had it, in said proceedings or in ancillary proceedings instituted either by the original petitioners, the receiver of the court, the bankrupt's trustee, or of the court's own motion, jurisdiction to bring in the alleged fraudulent transferee of the property, thus in the
32 court's possession, and do full and complete justice in one litigation?

Witness our hands this 27th day of November, in the year 1900.

NATHAN GOFF,
Senior Circuit Judge.
CHARLES H. SIMONTON,
Circuit Judge.
EDMUND WADDILL, JR.,
District Judge.

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the foregoing is a true copy of the original certificate of the questions of law certified to the Supreme Court of the United States, filed and now remaining of record in the therein-entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said U. S. circuit court of appeals for the fourth circuit, at Richmond, this 3rd day of December, in the year of our Lord one thousand nine hundred.

Seal United States Circuit Court of Appeals, Fourth Circuit.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Ct.

Endorsed on cover: File No., 17,989. U. S. C. C. of appeals, 4th circuit. Term No., 504. John D. Wall and Thomas W. Huske, trading as Wall & Huske, appellants, *vs.* Walter O. Cox, trustee of W. H. Gilbert, trading as Winston Hardware Company and as Gilbert Hardware Company. Filed December 10th, 1900.